UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LHP Software, LLC d/b/a LHP Engineering,

Plaintiff,

v.

L. Francis Cissna, Director, United States Citizenship and Immigration Services,

Defendant.

C/A No.: _____

1:19-cv-1547 [redacted]
JPH-DLP

# COMPLAINT

Plaintiff ("LHP") is a local engineering firm that serves the automotive industry, primarily in Columbus, Indiana, and Detroit, Michigan, by integrating on-board computer systems with traditional automotive systems (braking systems, airbags, cruise control, emission control, etc.). To serve its clients, LHP sought a visa for a position that requires a bachelor' s degree in engineering. Defendant ("USCIS") however denied the visa for two reasons. First, it determined that LHP did not have enough in-house work for the next three years to hire an engineer. Second, it determined the engineering position did not require a college degree. That's right; USCIS said an engineering firm grossing $44 million a year did not have enough work to hire an additional employee and an engineering position did not require college degree. Both decisions are arbitrary and capricious. For the reasons below, this Court should set aside USCIS's denial and order them to grant the visa.

## PARTIES

1. Plaintiff LHP Software, LLC d/b/a LHP Engineering ("LHP") is a limited liability company organized under the laws of Indiana with its principle place of business in Columbus, Bartholomew County, Indiana.

2. Defendant L. Francis Cissna is the Director of United States Citizenship and Immigration Services ("USCIS"). He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H).

## VENUE AND JURISDICTION

3. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

4. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA").

5. Under the APA, this Court can set aside final agency action and compel agency action. 5 U.S.C. § 706.

6. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because LHP and USCIS do business in Bartholomew County at their principle place of business and the Indianapolis Field Office, respectively.

8. No statute or regulation requires an administrative appeal in this case. Thus, Plaintiff has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

9. USCIS's denial of Plaintiff's Form I129, Petition for Nonimmigrant Worker is a final agency action. 5 U.S.C. § 704.

## LEGAL FRAMEWORK

*H1B Visa Program*

10. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

11. Specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

12. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H1B Visa").

13. The relevant regulation identifies the following as exemplar backgrounds for specialty occupations: "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." 8 C.F.R. § 214.2(h)(2)(ii).

14. Employers start the H1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

15. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

16. The employer then signs the approved Labor Condition Application and agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the

employer that signs the Labor Condition Application is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

17. After receiving an approved Labor Condition Application and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

18. USCIS's then reviews the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

*H1B Eligibility Criteria*

19. USCIS is charged with determining only whether a proffered position is a "specialty occupation."

20. Congress defined "specialty occupation" as a position that requires a certain level of education or experience:

> (1) . . . the term "specialty occupation" means an occupation that requires—
>
> > (A) theoretical and practical application of a body of highly specialized knowledge, and
> >
> > (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> > (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
> >
> > (B) completion of the degree described in paragraph (1)(B) for the occupation, or

> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

21. USCIS has further interpreted these requirements in its regulations:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

22. 8 C.F.R. § 214.2(h)(4)(iii)(A).

23. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

24. To determine whether a position is indeed a specialty occupation, USCIS often refers to the United States Department of Labor's Occupation Outlook Handbook ("OOH").

25. The Department of Labor regularly updates and supplements the OOH with ongoing surveys of each occupation's worker population and occupation experts. *See* https://www.onetonline.org/help/onet/ (Last accessed April 16, 2019). The Department of Labor considers the O*NET program to be "the nation's primary source of occupational information." *Id.*

26. Upon approval of the H1B Visa application, the employee may work for up to three years for the petitioning employer in the particular specialty occupation. 8 U.S.C. § 1184(g).

27. In addition to this statute and regulation, in the last three years, USCIS has created various substantive rules through sub-regulatory guidance with dubious legal authority.

*Specific, Non-Speculative Work Rule*

*28.* Consistent with the Buy American Hire American Executive Order, recently, USCIS has started seeking evidence that the petitioning employer provides evidence that petitioner has specific, non-speculative work in a specialty occupation for the beneficiary for the entirety of the length of the visa.

29. While the parameters of USCIS's "Specific, Non-Speculative Work Rule" are unclear, it is clear that, if the employer cannot show consistent work for an employee for the next three years, regardless of the nature and details of such work, it cannot satisfy USCIS's Specific, Non-Speculative Work Rule.

30. But the statutory scheme rejects a requirement that the employer provide proof of specific or non-speculative work assignments for the *entirety of the duration* of the visa validity period. 8 U.S.C. § 1182(n)(2)(C)(vii).

31. In fact, § 1182(n)(2)(C)(vii) expressly allows employers to hire a foreign national with an H1B Visa and place them in a "non-productive status" (which is defined as not having enough work to perform) provided the employer continues to pay the wages required on the LCA. *Id.*

32. Importantly, congress authorized DOL, not USCIS, to oversee these worker-protection provisions through enforcement actions to compel compliance or remedy violations of the employer's attestations on the Labor Condition Application.

33. As mentioned above, an employer submits a Labor Condition Application, DOL approves it, and the employer signs it. At that moment, the employer has agreed to employ the beneficiary for the duration of the period approved—three years for most H1B Visa applications—in compliance with the terms of the Labor Condition Application. The terms of the Labor Condition Application include paying a prevailing wage during any periods of non-productive status.

34. Congress and DOL, therefore, ensure an employer will employ an employee in a specialty occupation for three years by requiring the employer to pay the worker the wage associated with the specialty occupation for the entirety of the three-year period. Congress did not require an employer to identify specific, non-speculative work duties for three years.

35. USCIS's Specific, Non-Speculative Work Rule defies this paradigm.

36. First, nothing in 8 U.S.C. § 1184(i) indicates that Congress intended to delegate this authority to USCIS. USCIS seemingly recognizes this by trying to shoehorn its Specific, Non-Speculative Work Rule into its analysis of whether a particular position is a specialty occupation.

37. Second, USCIS tacitly recognized that a Specific, Non-Speculative Work Rule is a legislative rule, requiring notice and comment rulemaking, because it issued a notice of proposed rulemaking to enact a similar rule in 1998. *See* Proposed Rule, *Petitioning Requirements for H Nonimmigrant Classification*, 63 Fed. Reg. 30419 (June 4, 1998).

38. In the Proposed Rule USCIS proposed prohibiting hiring "temporary foreign workers to meet possible workforce needs arising from *potential business expansions or the expectation of potential new customers or contracts*." *Id.* But even under such proposed rule, USCIS would only consider whether there was work available when the petition was initially filed. *Id.* Thus, even though the proposed rule sought to preclude speculative work, it did not go nearly as far as

requiring specific and non-speculative work assignments for the entire three-year duration of the visa validity period. *See id.*

39. However, on October 21, 1998, before USCIS could conclude notice and comment on this proposed rule, congress passed and the President signed the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV, Pub.L. 105-277 (October 21, 1998). ACWIA contained the "non-productive status" provision, allowing gaps in employment for H1B Visa holders but requiring H1B Visa employer to pay those workers during any such non-productive status. *See* 8 U.S.C. § 1182(n)(2)(C)(vii).

40. It is no surprise USCIS abandoned its rulemaking; Congress explicitly rejected it. Curiously, USCIS's Administrative Appeals Office continues to cite to this abandoned rulemaking as controlling legal authority to justify its demands that consulting and staffing companies provide evidence of guaranteed specific and non-speculative work assignments for the entire three years of an H-1B Visa.

41. USCIS's Specific, Non-Speculative Work Rule seeks to go further than its 1998 proposed rule and it directly conflicts with § 1182(n)(2)(C)(vii). It is therefore unlawful.

*One-Degree Rule*

42. Similarly, USCIS has created a One-Degree Rule.

43. Under the One-Degree Rule, USCIS refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the proffered position does not require one specific degree.

44. In other words, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it requires one *specific* degree.

45. Various courts have identified this rule and rejected it:

> [USCIS's] implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.

46. *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

47. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

48. The One-Degree Rule is *ultra vires* and arbitrary and capricious. It is further entitled to no deference.

*Most, But Not All Rule*

49. Similarly, USCIS has created a Most, But Not All Rule.

50. USCIS considers the OOH authoritative and dispositive.

51. The OOH separates occupations into five separate job zones. The job zones correspond with the overall experience, job training, and education required for entry into a particular occupation. *See* Job Zone Procedures (*available at* https://www.onetcenter.org/dl_files/JobZoneProcedure.pdf (last visited April 16, 2019).

52. Relevant to specialty occupations, the OOH states that the education necessary to enter into an occupation in Job Zone Four as follows: "Most of these occupations require a four-year bachelor's degree, but some do not." *Id.* at 12.

53. The particular OOH entries on the O*Net then identify the percentages of employees in that field that have a four-year degree (and higher) versus those that do not.

54. USCIS, rather than considering the percentage of employers that require a bachelor's degree or more, seizes on the "some do not" language associated with all Job Zone Four positions and deems it binding. USCIS reasons that, because some positions do not require college degrees or more, the proffered Job Zone Four position cannot be a specialty occupation.

55. Under the Most, But Not All Rule, USCIS refuses to find a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position" where the OOH reports that most but not all positions require a bachelor's degree or higher in a specific occupation.

56. Thus, under this rule, a proffered position can only satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A) if it is in Job Zone Five.

57. If a proffered position satisfies § 214.2(h)(4)(iii)(A), the proffered position is a specialty occupation; satisfying this regulation alone is dispositive of whether a proffered position is a specialty occupation.

58. The Most, But Not All Rule is *ultra vires* and it is arbitrary and capricious.

**FACTS**

59. LHP is an engineering firm that provides technology solutions to the automotive, aerospace, and defense industries throughout the United States.

60. LHP's solutions require unique integration between technology and engineering.

61. LHP works with manufacturers to develop software and technology to control the onboard (or embedded) automotive systems. Such systems include electrical systems, navigation equipment, safety mechanisms, breaking systems, cruise control, automation, etc.

62. To be able to develop this technology, some LHP employees must be engineers.

63. After a two year employee search, LHP identified a potential employee with the necessary background and skills to fill a position as a Technical Specialist — Embedded Controls. But the potential employee is a foreign national.

64. Thus, in April 2018, LHP filed an application for an H1B visa for the employee to be a Technical Specialist – Embedded Controls.

65. In the Labor Condition Application, LHP averred the position would fall within the SOC (ONET/OES) Code 15-1199 for Computer Occupations, All Other.

66. LHP described this as a Wage Level IV position; this is the highest wage level for such a position. In fact, LHP then explained that it intended to offer a wage higher than that required by the DOL.

67. On the Labor Condition Application, LHP also stated that the beneficiary's lone worksite would be LHP's office in Pontiac, Michigan. It identified no other job sites.

68. LHP submitted the Labor Condition Application, and DOL certified it for three years. LHP then signed it.

69. At this point, DOL had jurisdiction to enforce all of the obligations in the Labor Condition Application against LHP.

70. Along with this certified Labor Condition Application, LHP then filed a Form I-129, Petition for Non Immigrant Worker to USCIS.

71. In its application, LHP described the position generally as follows:

> Reporting to the LHP Software Solutions (LSS) President, Director of Engineering Operations or Senior Solutions Architect, the Technical Specialist is responsible for technology development, technical project delivery and sales support for Embedded Controls. An embedded system is an electronic or computer system which is designed to control, access the data in electronics based systems. This system includes a single chip microcontroller such as cortex, ARM and also microprocessors, FPGAs, DSPs, and ASICs. We expect the Technical Specialist to work closely with senior management and engineering leaders to provide technical

> expertise to our customers, primarily in the automotive industry, in the following: optimized design, consuming less memory and faster execution rates; modular approach for architecture design and development; robust error handling and state-of-the-art testing methodology; embedded hardware design with enclosures to operate effectively under harsh operating environments and robust input and output communication protocols. Today, a typical automobile on the road has computer controlled electronic systems, and the most commonly used embedded systems in a vehicle include Airbags, anti-lock braking system, black box, adaptive cruise control, drive by wire, satellite radio, telematics, emission control, traction control, automatic parking, in-vehicle entertainment systems, night vision, heads up display, back up collision sensors, navigational systems, tire pressure monitor, climate control, etc.

72. LHP then provided a more detailed list of responsibilities.

73. Based on the requisite engineering and technical skills necessary to perform these duties, LHP described the minimum education requirements as: "electrical engineering, mechanical engineering, or computer engineering or a multidisciplinary field such as mechatronics engineering or control and automation engineering that unifies relevant aspects of electrical, mechanical and computer."

74. LHP sought a start date of October 1, 2018.

75. LHP submitted the application on April 4, 2018, as part of the H1B Visa Lottery. That year, over 200,000 companies submitted petitions for H1B visas. Luckily, LHP's petition was selected in the H1B lottery.

76. On January 29, 2019, four months after the proposed start date and ten months after receiving the application, USCIS issued a request for evidence. It should be noted that USCIS reported that, on average, it takes .83 hours to adjudicate a Form I-129, Petition for a Non Immigrant Worker. *See* Notice of Proposed Rule Making, 81 Fed. Reg. 26904, 26925 (May 4, 2016).

77. The Request for Evidence sought additional evidence about the "specific duties of the offered position and nature of business operations" and the regulatory criteria at § 214.2(h)(4)(iii)(A).

78. LHP timely responded.

79. Almost a year after LHP applied, on March 4, 2019, USCIS denied the H1B Visa.

80. Based on its Specific, Non Speculative Work Rule, USCIS claimed that LHP's evidence of the volume of its work was insufficient to demonstrate that it had a specific project that the beneficiary will work on during the tenure of his inhouse work.

81. The Denial then goes through the four disjunctive eligibility requirements at § 214.2(h)(4)(iii)(A) and determines that LHP failed to satisfy any of them. It does so by applying the One-Degree Rule and the Most, But not All Rule mentioned above.

82. More than a year after its application, LHP has been unable to find an employee with the beneficiary's qualifications.

83. The beneficiary remains outside of the United States.

84. LHP is on the verge of losing a significant contract without the services of this employee.

85. LHP will suffer irreparable harm if it loses this contract in the form of reputational harm, harm to good will, and financial harm.

86. This case followed.

FIRST CAUSE OF ACTION
(APA - the Denial is Arbitrary and Capricious)

87. Plaintiff re-alleges all facts herein.

88. USCIS's denial is final agency actions that aggrieved Plaintiff. 5 U.S.C. § 704.

89. USCIS's denial is based on its Specific, Non-Speculative Work Rule, its One Degree Rule, and its Most, But Not All Rule.

90. USCIS's denial violates the APA because its bases— Specific, Non-Speculative Work Rule, its One Degree Rule, and its Most, But Not All Rule —are *ultra vires* and, therefore, the Denial is in excess of statutory jurisdiction, authority, or limit. 5 U.S.C. § 706(2)(C).

91. USCIS's denial violates the APA because its basis— Specific, Non-Speculative Work Rule, its One Degree Rule, and its Most, But Not All Rule —constitute legislative rules that did not go through notice and comment rulemaking and, therefore, the denials are without observance of a procedure required by law. 5 U.S.C. §§ 553, 706(2)(D).

92. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is arbitrary and capricious as it contradicts § 1182(n)(2)(C)(vii) and DOL's approval of the Labor Condition Application finding without any rational basis or explanation. 5 U.S.C. § 706(2)(A).

93. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —is arbitrary and capricious as the Plaintiff provided sufficient evidence in its H1B Visa application to prove specific, non-speculative work and, therefore, the denial is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

94. USCIS's denial violates the APA because its basis—the Specific, Non-Speculative Work Rule —violates the Plaintiff's freedom to contract under the United States constitution and, therefore, is contrary to a constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B).

95. USCIS's denial violates the APA because its basis—the One Degree Rule—is *ultra vires* and arbitrary and capricious. *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996–97 (S.D. Ohio 2012); *see also Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).

96. USCIS's denial violates the APA because its basis—the Most But Not All Rule—is *ultra vires* and arbitrary and capricious.

97. USCIS's determination that the Plaintiff's proffered position is not a "specialty occupation" is arbitrary and capricious.

98. Similarly, to the extent these rules are lawful, as applied, the denial is arbitrary and capricious. A final agency action is arbitrary and capricious where:

> USCIS has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before USCIS, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

99. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the One Degree Rule, which is *ultra vires*, unlawful, and arbitrary and capricious.

100. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is based on the Most, But Not All Rule, which is *ultra vires*, unlawful, and arbitrary capricious.

101. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it lacks reasoned decisionmaking as vast swaths of the analysis are indecipherable.

102. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it considered factors Congress did not intend USCIS to consider.

103. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it entirely failed to consider an important aspect of the problem.

104. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because its rationale runs counter to the evidence in the record.

105. USCIS's determination that the proffered position is not a specialty occupation is arbitrary and capricious because it is so implausible it cannot be the result of Agency expertise.

106. Finally, until Plaintiff acquires the certified administrative record, it will be unable to identify all claims of error; Plaintiff expressly reserves the right to make additional claims of error under the APA after production of the certified administrative record.

107. USCIS's denial is substantially unjustified and this Court should set it aside, remand the case to USCIS, declare Plaintiff's proffered position as a specialty occupation, instruct it to re-adjudicate the H1B Visa application without applying the Specific, Non-Speculative Work Rule, its One Degree Rule, or its Most, But Not All Rule.

PRAYER FOR RELIEF

Plaintiff, therefore, prays that this Court enter the following relief:

1. Take jurisdiction over this case;

2. Declare USCIS's One Degree Rule unlawful or arbitrary and capricious;

3. Declare USCIS's Most, But Not All Rule unlawful or arbitrary and capricious;

4. Declare USCIS's Specific, Non Speculative Work Rule unlawful or arbitrary and capricious;

5. Declare USCIS's denial in this case violative of the Administrative Procedure Act;

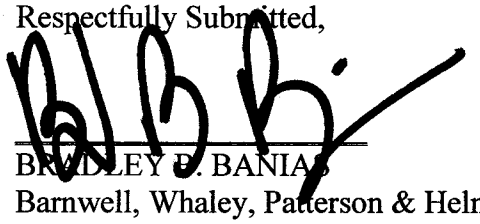
6. Remand this case to USCIS with instructions to re-adjudicate the case in compliance with the above declarations within 15 calendar days;

7. Grant all relief that is necessary and proper; and

8. Award attorneys' fees and costs under the Equal Access to Justice Act.

April 16, 2019

Respectfully Submitted,



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*Pro Hac Vice Application Pending*

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